ESTATE OF DANA A. KNIGHT

IBIA 80-51 Decided October 22, 1981

Appeal from an order denying a petition for rehearing by Administrative Law Judge Sam E. Taylor.

Affirmed.

1. Indian Lands: Patent in Fee: Jurisdiction

   The Federal trust responsibility over allotted land or any fractional share thereof is extinguished as to that interest immediately upon its acquisition by a non-Indian. The ministerial issuance of a fee patent serves only a recordkeeping function and is without legal significance in respect to dissolution of the Department's role as trustee.

2. Indian Lands: Patent in Fee: Jurisdiction

   The Department of the Interior owes no fiduciary duties of any kind to a non-Indian who has acquired an interest in allotted trust land.

APPEARANCES: Yvonne T. Knight, Esq., for appellants Yvonne T. Knight, Hepsey Knight, Ruth Eva Knight, Vanessa Knight Wilson, and Rozina Knight. Counsel to the Board: Kathryn Lynn.

IBIA 80-51

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Dana A. Knight, an unallotted Ponca, died on December 5, 1978, at the age of 62 years. After a hearing held at Pawnee, Oklahoma, on August 1, 1979, Administrative Law Judge Sam E. Taylor approved decedent's will dated January 21, 1976, and ordered distribution of decedent's property to his wife, Hepsey Knight, and daughters Yvonne Teresa Knight, Ruth Eva Knight, Vanessa Knight Wilson, and Rozina Knight (appellants). The Judge denied a motion to include in decedent's trust property certain portions of allotments that had descended to decedent from his maternal Indian grandparents through his non-Indian father. The appellants petitioned for a rehearing on the sole issue of whether the motion was properly denied. On June 5, 1980, Judge Taylor denied the petition for rehearing and made several technical corrections to the earlier order approving the will and ordering distribution. Appellants sought review of that order by the Board.

Background

The decedent's mother, Lena Black Hair Horse Knight, Ponca Allottee No. 244, was the daughter of Black Hair Horse, Ponca Allottee No. 239, and Ruth Black Hair Horse, Ponca Allottee No. 240. Upon the deaths of her parents, Lena Black Hair Horse Knight inherited a portion of each of their allotments. Lena Black Hair Horse Knight died intestate on April 25, 1955. Her heirs were determined to be her non-Indian husband, Tony H. Knight, and her two sons, Dana A. Knight (decedent) and Louis V. Knight, both Ponca unallottees. Each heir inherited an

undivided one-third interest in her trust property. Estate of Lena Black Hair Horse Knight, Probate No. H-171-55 (Aug. 5, 1955).

Tony H. Knight died testate in October 1956. Under the provisions of his will, all of his property was devised equally to his sons Dana A. Knight and Louis V. Knight. Included in Tony H. Knight's real property were the portions of Ponca allotments 239 and 240 inherited from his wife. In the Matter of the Estate of Tony H. Knight, Deceased, No. 14,547-A (Kay County Ct., Okla. Aug. 2, 1957). At the time of his death, Tony H. Knight had not been issued a fee patent to his inherited portions of Ponca Allotments 239 and 240.

Discussion and Conclusions

Appellants argue first that land allotted under the General Allotment Act of February 8, 1887, 24 Stat. 388 (Act), which passes to a proper Indian beneficiary through a non-Indian, to whom a fee patent has not been issued, regains its full trust status under the Act. Appellants acknowledge that under Bailess v. Paukune, 344 U.S. 171 (1952), allotted Indian lands take on a different status when they are held by a non-Indian. They urge, however, that Chemah v. Fodder, 259 F. Supp. 910 (W.D. Okla. 1966), makes the issuance of a fee patent to the non-Indian owner the significant point at which Federal Indian statutes no longer apply to the land. Until the fee patent is issued, they argue, title to the land remains in trust, although the Department of the Interior owes no fiduciary duties to the owner. If, therefore, the land is acquired by a proper Indian beneficiary before the fee

patent is issued, this theory would revive the entire panoply of trust responsibilities involving the Department.

Appellants' characterization of the issue involved in this case attempts to shift the inquiry away from the effect of the inheritance of trust land by a non-Indian to the effect of a later inheritance by an Indian. The question before the Board, however, is not whether the General Allotment Act intends to protect Indians inheriting from non-Indians, but what the consequences are when trust property is inherited by a non-Indian.

The Bailess and Chemah opinions concern the legal status of allotted land in Oklahoma when inherited by non-Indians. Both Bailess and Chemah agree that the acquisition of an interest in trust property by a non-Indian renders the trust "dry and passive." The Supreme Court held in Bailess that when allotted land is inherited by a non-Indian "there remains only a ministerial act for the trustee to perform, namely the issuance of a fee patent to the cestui." 344 U.S. at 173. In Chemah, the Federal district court was bound by the Supreme Court's interpretation of law but expanded on it by noting that the Secretary of the Interior could issue the required fee patent to a non-Indian heir in one of two ways, thereby addressing that part of the case which pertained to requested partitioning of an allotment. The Chemah opinion states:

> The plain import of the decision of Bailess v. Paukune, supra, is to require the issuance of a patent in fee to the non-Indian plaintiff. The Secretary of the

> Interior may cause her interest to be partitioned in kind from the remainder of the allotment and issue a patent in fee to her for her aliquot part. It would seem that he could also issue to her a patent in fee for her undivided interest in the whole allotment, but it is suggested that the use of such method would solve nothing and would further confound the existing problems of multiple ownership.

259 F. Supp. at 912-13.

[1] The Chemah opinion therefore cannot be cited for the proposition advanced by appellants (that the Secretary may refrain from granting fee patent title to a non-Indian heir). Consequently, it is a logical consequence of the holdings in Bailess and Chemah that if by administrative oversight the Secretary fails to perform the ministerial act of issuing the required fee patent to a non-Indian heir of Indian land, this breach of duty cannot serve to bestow trust privileges on the non-Indian heir or his successors in interest. Accordingly, the Federal trust responsibility over allotted land or any fractional share thereof is extinguished as to that interest immediately upon its acquisition by a non-Indian. The ministerial issuance of a fee patent serves only a recordkeeping function and is without legal significance in respect to dissolution of the Department's role as trustee.

This holding comports with longstanding Departmental precedent. In a memorandum opinion dated September 10, 1938, former Interior Solicitor Nathan R. Margold stated:

> The interest inherited by Amanda Pratt, she being a white woman passed to her free from restrictions. Departmental jurisdiction then terminated and Mrs. Pratt became

> invested with unrestricted control, with full power of disposal. Levindale Lead Co. v. Coleman, 241 U.S. 432; Mixon v. Littleton, 265 Fed. 603; Unkle v. Wills, 281 Fed. 29, 35. Such restricted control and power of disposal is unaffected by the fact that the legal title may remain in the United States until fee simple patent issues. The unrestricted power of control and disposal depends in no way upon issuance of patent. It may be exercised before patent issues and in such event the patent, when issued, inures to the benefit of the grantee. Mixon v. Littleton, supra. Nonissuance of the patent, therefore, constitutes no valid ground for reassumption of departmental jurisdiction nor may it be properly used as a basis for a demand that the parties submit to departmental jurisdiction. Any proposal so to do savors strongly of an abortive effort to reimpose by administrative action restrictions which have lawfully terminated.

I Op. Sol. 851- 852.

Therefore, in this case, the fact that a fee patent had not been issued to Tony H. Knight, decedent's non-Indian father, before his death in 1956 is not dispositive because the Department's trust responsibilities over the disputed interests in Ponca Allotments 239 and 240 were terminated when those interests were acquired by a non-Indian. The subsequent inheritance of those interests by the decedent, an Indian, could not operate in itself to reestablish a relationship that had been legally terminated.

Appellants further argue by analogy to common law trust principles that a trust remains active during the winding-up period and the trustee continues to owe fiduciary duties to the beneficiaries in determining how to terminate the trust. Appellants suggest the Supreme Court did not address the question of the Department's responsibilities in winding up a trust when it stated in Bailess that the trust as to a

non-Indian was "dry and passive." Therefore, they urge that some active trust responsibilities are not precluded by Bailess. The statutory trust relationship established between the Department and Indian owners of allotments differs, however, from a trust set up under the common law. See United States v. Mitchell, 445 U.S. 535, 542 (1980). It is, therefore, misleading to rely too heavily on the common law of trusts in interpreting that relationship. 1/

[2] Appellants, however, misconstrue the Department's duties in winding up the trust because of the acquisition of an interest in allotted lands by a non-Indian. As was previously discussed, when an interest in trust property is acquired by a non-Indian, the trust is immediately terminated to the extent of that interest. The Department owes no trust duties of any kind to the non-Indian. 2/ Any remaining fiduciary duty to be circumspect in the manner of terminating the trust would be owed only to those Indians who might be affected by the termination. 3/ Thus, it cannot be found that the trust as to Tony H. Knight's interests in Ponca Allotments 239 and 240 remained active

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1/ The problems inherent in such reliance are also seen in appellants' argument that the Indian trust relationship, like a common law trust, can survive the absence of any one of the three elements of a trust: A trustee, a beneficiary, and trust property. Assuming, arguendo, that the relationship could survive the absence of a trustee or of trust property, as was just discussed the Indian trust relationship terminates in the absence of a proper Indian beneficiary.

2/ See, e.g., Administrative Appeal of James P. Bowen v. Superintendent, Northern Cheyenne Agency, 3 IBIA 224, 82 I.D. 19 (1975). In this case a fee patent was issued before a dispute arose.

3/ It is conceivable that in discharging its trust responsibilities to such Indians, the Department might be required to terminate a trust in a manner unfavorable to the best interests of the non-Indian owner, or, as opined in Chemah, supra at 913, in a manner which will not "further confound the existing problems of multiple ownership."

because the Department had not discharged its duties relating to winding up the trust.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the order denying the motion to add the interests in Ponca Allotments 239 and 240 inherited by decedent from Tony H. Might to the inventory of decedent's trust property is affirmed. 4/

This decision is final for the Department.

Franklin D. Arness
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative judge

Jerry Muskrat
Administrative Judge

4/ Section 5 of the Indian Reorganization Act, June 18, 1934, 48 Stat. 984, 985, 25 U.S.C. § 465 (1976), permits acquisition of lands in trust for individual Indians by the Secretary. Applications to acquire lands in trust status are treated on a case-by-case basis by the Department. There appears to be no impediment to an application by appellants in this case for acquisition by the United States of their inherited lands to be held in trust status for them. Appellants acknowledge that they have not pursued this administrative remedy to achieve the results sought by this probate appeal. Appellants' Opening Brief at 2.